

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

There is little dispute between the parties as to the salient facts surrounding this claim. Claimant was on unemployment and seeking a job by looking through the ads in the newspaper. Claimant knew his unemployment insurance was running out and he was desperate for a job. He identified a possible employer in Independence, Missouri, called the business on the phone from his home in Kansas and spoke to the individual, Mark Simmons, who was in charge of hiring. During the course of this call both individuals discovered that they knew each other from another employment experience.

Eventually both parties expressed an interest in creating an employment relationship. Respondent was in need of help and claimant was in need of a job. Claimant contends that a job was offered to him during this phone call and that he accepted that job. Indeed, claimant considered himself hired after this conversation.¹

Respondent, through Mr. Simmons, does not recall the conversation with that much specificity. But Mr. Simmons testified that claimant came to the shop to look things over a few days later and at that time, the two discussed claimant's rate of pay.²

Claimant began working for respondent the next Monday. Sometime that week, he brought home some papers to complete which he did, with the help of his wife. The papers were returned to the office and in the meantime, claimant was working for respondent.

The details surrounding claimant's injury are irrelevant as the parties' agree that claimant's entitlement to benefits hinges upon whether there is Kansas jurisdiction.

The Kansas Workers Compensation Act is to be liberally construed for the purpose of bringing employers and employees within the provisions of the Act.³ Both parties agreed Kansas case law states that the contract is "made" when and where the last act necessary for its formation is done.⁴ When an act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.⁵

¹ P.H. Trans. at 17.

² Simmons Depo. at 5.

³ *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

⁴ *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

⁵ *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973).

Here, there appears to have been substantial discussions between the claimant and Mr. Simmons over the phone. And while claimant subjectively believed that he had been hired during that call, he confirms Mr. Simmons assertion that the two did not discuss his rate of pay until he appeared at respondent's place of business, in Missouri, several days later.

The ALJ apparently concluded that claimant's decision to accept what he believed to be a job offer, while he was at his home in Kansas, constituted the last act necessary to create an employment contract. But this Board Member disagrees. The fact that the two had a lengthy conversation and claimant believed he had been hired is not necessarily determinative. Both claimant and Mr. Simmons testified that the two did not talk about the issue of money until they met in person in Missouri. Claimant's rate of pay was an essential part of the contract. Although claimant admits that he was in need of employment and would have accepted anything, that statement is mere hyperbole. Mr. Simmons felt that claimant wanted something more than he could pay but during their conversation, the two agreed on a sum. At that point the parties had a meeting of the minds on all essential terms. Each knew what the other would do, would earn, would pay and when the work would commence.

This finding is supported by the Supreme Court's holding in *Wilkinson*.⁶ In *Wilkinson*, the two parties had engaged in substantial negotiations, but certain terms remained undecided, including what salary to be paid, the position to be held and the work schedule. Similarly, in this instance, claimant appeared at respondent's business in *Missouri*, looked at the shop, talked about salary and came to an agreement about his wages and the day and time he would begin. This Board Member finds an employee's salary to be an essential term and absent an agreement on that issue, there could be no meeting of the minds.⁷

For these reasons, this Board Member reverses the ALJ and finds that Kansas has no jurisdiction in this matter. The last act necessary to form the contract, the agreement on the claimant's wage, occurred in Missouri.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as

⁶ *Wilkinson v. Shoney's Inc.*, 269 Kan. 194, 4 P.3d 1149 (2000).

⁷ See Corbin on Contracts, paragraph 2.8, p. 131 (revised ed. 1993), "mutual expressions of agreement may fail to consummate a contract for the reason that they are not complete, due to some essential term or terms not being agreed upon." *Id.* at 212-213.

⁸ K.S.A. 44-534a.

permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated August 10, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October 2007.

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge